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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/789,034	02/27/2004	James Postma		8343

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Donald W. Meeker  
Patent Agent  
924 East Ocean Front #E  
Newport Beach, CA 92661

EXAMINER
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WEINSTEIN, STEVEN L

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 10/30/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.

10/789,034

Applicant(s)

POSTMA ET AL.

Examiner

Steven L. Weinstein

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-4 is/are pending in the application.
- 4a) Of the above claim(s) 4 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-3 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)  
Paper No(s)/Mail Date \_\_\_\_.
- 4) ☐ Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_.

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Claim 4 is objected to under 37 CFR 1.75(c), as being of improper dependent form for failing to further limit the subject matter of a previous claim. Applicant is required to cancel the claim, or amend the claim to place the claim in proper dependent form, or rewrite the claim in independent form. Claim 4 is directed to a method of using ascorbic acid in soaking olive leaves or parts of the olive tree that makes up olive leaf extract, which as disclosed, appears to have some medicinal value. This is an entirely different invention than the process of claim 1, which is directed to maintaining the color of freshly picked olives.

To expedite prosecution, the following restriction requirement was made in regard to claims 1-4.

Restriction to one of the following inventions is required under 35 U.S.C. 121:

- I. Claims 1-3, drawn to a method of treating fresh olives, classified in class 426.
- II. Claim 4, drawn to a method of treating olive leaves or parts of the tree that makes up olive leaf extract for apparent medicinal use, classified in class 424.

The inventions are separate and distinct from each other because they are directed to two different methods classifiable in two different classes.

Because these inventions are independent or distinct for the reasons given above and have acquired a separate status in the art requiring separate searches as shown by their different classification, restriction for examination purposes as indicated is proper.

During a telephone conversation with Mr. Meeker on 10/19/06, a provisional election was made with traverse to prosecute the invention of Group I, claims 1-3. Affirmation of this election must be made by applicant in replying to this Office action. Claim 4 is withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1-3 are rejected under 35 U.S.C. 103(a) as being unpatentable over applicants' admission of the prior art (as evidenced, for example, on page 1, para.3 of the specification), as further evidenced by Jepson et al (5,837,304), Novo-Nordisk (RD 378028), Develter (3,630,226), Kellerman (3,397,999), and Levinson (3,002,839), in view of Scrimshire (4,664,926), further in view of Grasas y Aceites (40, 3, 182-189, 1989), Consejo Superior Investigacion (ES 2016470, 11/1/90), Bakal (4,572,836), Wyss et al (4,959,230), Miyama et al (JP 8-89934), Lewis et al (5,858,446), Organesoff et al (5,942,270), Warren (4,988,522), Forkner (2,901,359) and An Foras Talutais (GB 1,465,116).

In regard to claim 1, applicants' admission of the prior art discloses it was conventional to store freshly picked green olives in a liquid comprising water and acetic acid (i.e., vinegar solution). The conventionality of storing fresh or green olives in an acidic solution, and particularly acetic acid, is further evidenced by Jepson et al

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(e.g. fig. 1), Novo-Nordisk, Develter (col. 4, para. 3), Kellerman (col. 2, para. 4), and Levinson et al (col. 1, para. 8). The art taken as a whole teaches that the acetic acid, of course, lowers the pH and acts as an antibacterial agent to prolong storage life. See, e.g., Kellerman and Levinson in this regard. As for the pH limitation (found also in claim 2), the particular pH employed is seen to have been an obvious result effective variable, routinely determinable, and an obvious function of antibacterial strength versus taste impairment due to lowering the pH. Levinson discloses a pH as low as 2. Claim 1 differs from applicants' admission of the prior art as further evidenced by the secondary art, in the recitation that ascorbic acid is also added to the stored olives. As disclosed, applicants add the ascorbic acid as an antioxidant to prevent the olives from undergoing oxidation which causes the olives to be discolored or darker, thus losing their green color. From applicants' disclosure, it appears that it was well recognized in the art that green olives discolor during storage. That is, this was not an original observation on the part of the applicants. In any case, as evidenced by Scrimshire, it was well known in the art that olives are subject to oxidation, which, of course, is a problem common to most foods. Scrimshire discloses that oxidation of the olives produces a darker color, so that it is best to avoid oxidation (col. 1, para. 3). As evidenced by Grasas y Aceites, Consejo Superior Investigacion, Bakal, Wyss et al, Miyama et al, Lewis et al, Organesoof et al, Warren, An Foras Taluntais and Forkner are relied on to teach that not only is it notoriously well known in the art that oxidation causes discoloration of essentially all types of foods including plant derived foods, but the art taken as a whole teaches it was notoriously conventional to treat foods that are subject to oxidation and discoloration

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with ascorbic acid which is well known for its strong antioxidant properties and its ability to thus prevent discoloration. Therefore, since it was known that olives discolor due to oxidation and it was known that ascorbic acid is a good antioxidant that prevents discoloration, to modify applicants' admission of the prior art as evidenced by the secondary art, and add to the acetic acid storage solution, ascorbic acid as a discoloration prevention agent, antioxidant, for its art recognized and applicants intended function, would therefore have been obvious. Finally, in regard to the phrase "prevent discoloration of the olives from bruising and scarring", this property would be inherent in a food product treated with an antioxidant such as ascorbic acid. This is because bruising or scarring of fruits and vegetables exposes the food to air and oxidation which causes discoloration.

Several points are further noted. Grasas y Aceites appears to indicate that ascorbic acid had been added to the fruits (i.e. olives?) and that the ascorbic acid prevented darkening. It does not appear to disclose the nature of the treatment liquid. The examiner will attempt to obtain the complete article and a translation. On page 7 of the specification, applicants disclose using ascorbic acid performs the same function as sodium benzoate and lactic acid but ascorbic acid will keep the olives greener and crisper for a longer period of time. Sodium benzoate is also mentioned in the next paragraph. It is not clear from the specification what is the relationship between these statements and applicants' admission of the prior art. Are applicants stating that the prior art has used sodium benzoate in the storage of green olives as an antioxidant? If so, has the prior art used sodium benzoate in combination with acetic acid? Clarification

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is requested. In regard to claim 3, once it was obvious to employ ascorbic acid as an antioxidant agent to prevent discoloration, the particular amount employed would have been an obvious result effective variable.

The remainder of the references cited on the PTO892 form are cited as pertinent art.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Steven L. Weinstein whose telephone number is 571-272-1410. The examiner can normally be reached on Monday-Friday 7:00 A.M.-2:30 P.M..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Steve Weinstein  
STEVE WEINSTEIN  
PRIMARY EXAMINER  
10/26/06